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No. 84-1518

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1984

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TRI-STATE MOTOR TRANSIT CO., and
AMERICAN TRUCKING ASSOCIATIONS, INC.,

and

INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN AND HELPERS
OF AMERICA,

*Petitioners,*

v.

INTERSTATE COMMERCE COMMISSION and
UNITED STATES OF AMERICA,

and

THE DENVER AND RIO GRANDE WESTERN
RAILROAD COMPANY,

*Respondents.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

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## PETITIONERS' REPLY MEMORANDUM

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## TABLE OF CONTENTS


| | Page |
|---|---|
| ARGUMENT | 1 |
| CONCLUSION | 4 |


## TABLE OF AUTHORITIES


Cases:

American Trucking Assns. v. U.S., 364 U.S. 1 (1960) ..... 4
B-H Transfer Co. v. United States, 420 U.S. 968 (1975) ..... 4
United States v. Rock Island Co., 340 U.S. 419 (1951) ..... 4

United States Constitution:

Article III ..... 2

Statutes:

28 U.S.C. § 1254(1) ..... 2
28 U.S.C. § 2341 *et seq.* ..... 2, 3
49 U.S.C. § 11344(c) ..... 3

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### ARGUMENT

1. In its petition for certiorari in No. 84-1515, *in which it seeks review of the same judgment,* the government [1] asserts:

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[1] By "government" we refer jointly to the Interstate Commerce Commission ("ICC") and the United States.

> * * * if the ruling of the court below stands, there is the real prospect that other courts of appeals will feel free to entertain challenges to the substantive validity of this same ICC rule. And, for the indefinite future—until every court of appeals has sustained the rule—uncertainty will prevail and litigation will abound. The resulting burdens, for the government and for the courts, warrant this Court's intervention without further delay. [Pet. No. 84-1515, pp. 13-14, footnote omitted]

The "same ICC rule" is of course the ICC's repudiation of the longstanding "special circumstances" doctrine as applied to the granting of motor carrier operating authority to railroads and their affiliates. And if, as the government asserts (and we agree) the removal of the existing uncertainty and avoidance of future litigation concerning the validity of that rule warrants this Court's "intervention without further delay" the present petition should be granted because that is far more likely to accomplish that result.

The "uncertainty" can be removed in either of two ways. The first is, of course, review on the merits of the Interstate Commerce Act issue, which is raised only in the Tri-State petition. The second is by accepting the government's interpretation of the Administrative Orders Review Act (Hobbs Act), in which event any future attempt by a litigant who is adversely affected by the operation of the new rule will be barred from challenging its validity. That issue, too, can be resolved if the Tri-State petition is granted, and must indeed be addressed at the outset because it affects the jurisdiction of the Court of Appeals. See p. 9 of our Brief in Opposition in No. 84-1515. Moreover, there is a greater likelihood that the Hobbs Act issue will actually be resolved if the Court grants the Tri-State petition because there is, at the very least, a very substantial doubt whether the Court has jurisdiction under 28 U.S.C. § 1254(1) and Article III of the Constitution to entertain the government's petition.

See *id.*, pp. 3-9. It may be pertinent in this connection that if the Court were to take the unprecedented step of granting a petition at the behest of a party which fully prevailed in the Court of Appeals (see *id.*, p. 5), it would open the door to the filing of future petitions for certiorari by such parties who seek a definitive resolution of a question in which they have a continuing interest. Finally, if the Court were to decide, in accord with the court below and the three other Circuits which have passed on the issue (*id.* pp. 10-11), that the Hobbs Act does not bar affected parties from challenging the legality of the ICC's new rule, the future litigation which the government fears will occur absent a decision on the merits on Tri-State's petition.

In sum, the "uncertainty" which concerns the government is far more likely to be removed if this Court grants the petition of Tri-State, *et al.*, in No. 84-1518, and this petition should be granted.

2. In its Brief in Opposition respondent Denver & Rio Grande Western Railroad Company attributes to us the "inexplicable concession to this Court that the 'special circumstances' doctrine is 'statutorily required' only with respect to licensing proceedings, the only matter resolved in *Ex Parte MC 156* * * * "(DRGW Br. p. 6, n. 4). In thus attributing a "consession" to us, respondent Railroad has misread the passage in question, the object of which was to describe as precisely as possible the interrelationship between Congressional and agency action with regard to acquisitions and licensing respectively. While we believe that our original statement was as clear as language permits, the importance of the point merits reiteration. The Interstate Commerce Act by its express terms (presently 49 U.S.C. § 11344(c)) restricts only rail *acquisitions* of motor carriers. However, the ICC in 1938 applied the same restriction to railroad applications for motor carrier operating *licenses*. To that extent, the licensing restrictions originated with the Com-

mission. But those restrictions were ratified by Congress in 1940 with respect to *both acquisitions and licensing*. By that 1940 ratification the licensing restrictions also became "statutorily-required" (DRGW Br. p. 6, n.4.) The ICC itself so recognized in the *Rock Island* case quoted at p. 5 of our petition, and this Court so held in *United States v. Rock Island Co.*, 340 U.S. 419, 432 (1951), reaffirmed in *American Trucking Assns. v. U.S.*, 364 U.S. 1, 6-7 (1960) (*ATA II*). The latter case made entirely clear that the "special circumstances" doctrine with respect to both acquisitions and licensing is "Congressional" policy. See pp. 11-15 of our petition. We note that neither of the briefs in opposition discuss those decisions, and that the government is conspicuously silent concerning the inconsistency between its discussion thereof in its brief to this Court in the *B-H Transfer Co.* case, quoted at pp. 14-15 of our brief, and its present position.

## CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for certiorari in No. 84-1518 should be granted.

Respectfully submitted,

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